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NORTHERN DISTRICT OF CALIFORNIA

7 UNITED STATES DISTRICT COURT  
8 NORTHERN DISTRICT OF CALIFORNIA  
9 SAN FRANCISCO DIVISION

VC

10 **CV 14 80 304** MISC  
Misc. No.

11 SECURITIES AND EXCHANGE COMMISSION,  
12 Applicant,  
13 v.  
14 PHILLIP CORY ROBERTS,  
15 Respondent.

SECURITIES AND EXCHANGE  
COMMISSION'S:

- APPLICATION FOR AN ORDER COMPELLING COMPLIANCE WITH ADMINISTRATIVE SUBPOENA
- MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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APPLICATION

Applicant Securities and Exchange Commission (“Commission”) hereby applies to the Court for an order compelling Respondent Phillip Cory Roberts to comply with an administrative subpoena issued by the Commission requiring his appearance for testimony.

This is an administrative enforcement action. The Court has jurisdiction under Section 22(b) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. § 77v(b)] and Section 21(c) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78u(c)]. This application is based on Respondent’s refusal to appear for testimony in response to a validly-issued, administrative subpoena. Attorneys for the Commission have attempted to meet and confer with Respondent’s counsel to reach an agreement regarding a date when Respondent would appear for testimony without success. The application is supported by the accompanying Memorandum of Points and Authorities, the Declaration of Thomas W. Peirce in support thereof, the proposed order, and such further evidence and argument as the Court may consider.

Dated: November 7, 2014

Respectfully submitted,

  
Cheryl L. Crumpton  
Thomas W. Peirce

Attorneys for Applicant  
SECURITIES AND EXCHANGE  
COMMISSION

**TABLE OF CONTENTS**

1

2

3 I. INTRODUCTION ..... 1

4 II. STATEMENT OF FACTS ..... 2

5 A. The Commission’s Investigation ..... 2

6 B. Service of the Administrative Subpoena..... 4

7 C. Respondent’s Failure to Comply with the Properly-Issued Subpoena and the

8 Commission’s Attempt to Meet and Confer ..... 6

9 III. ARGUMENT ..... 7

10 A. This Court Has the Authority to Enforce the Commission’s Validly-Issued

11 Subpoena in a Summary Proceeding..... 7

12 B. The Commission’s Subpoena to Respondent Satisfies the Standards for Judicial

13 Enforcement. .... 8

14 1. The Commission Is Authorized to Conduct this Investigation. .... 8

15 2. The Commission Followed All Procedural Requirements for Issuance and

16 Service of the Administrative Subpoena to Respondent..... 8

17 3. The Subpoena to Respondent Was Issued for the Proper Purpose of

18 Obtaining Relevant and Material Evidence. .... 10

19 IV. CONCLUSION..... 13

20

21

22

23

24

25

26

27

28

**TABLE OF AUTHORITIES**

**CASES**

*EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443 (9th Cir. 1998) ..... 8

*Bowles v. Bay of New York Coal & Supply Corp.*, 152 F.2d 330 (2d Cir. 1945) ..... 9

*CFTC v. Ekasala*, \_\_\_ F. Supp.2d \_\_\_, 2014 WL 3756130 (Jul. 31, 2014 D.D.C.)..... 9

*EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426 (9th Cir. 1983)..... 8

*EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071 (9th Cir. 2001) ..... 8

*EEOC v. St. Regis Paper Co.-Kraft Div.*, 717 F.2d 1302 (9th Cir. 1983)..... 7

*SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047 (2d Cir. 1973)..... 7

*SEC v. Dresser Indus.*, 628 F.2d 1368 (D.C. Cir. 1980)..... 8

*SEC v. F.N. Wolf & Co., Inc.*, No. 93-0379, 1993 WL 568717 (S.D.N.Y. Dec. 14, 1993)..... 9

*SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984) ..... 7, 8

*SEC v. Sears*, No. 05-728, 2005 WL 5885548 (D.Or., July 28, 2005) ..... 11, 12, 13

*SEC v. Stilwell*, No. 14-257, 2014 WL 4631915 (S.D.N.Y. Sept. 11, 2014) ..... 11, 12

*United States v. Church of Scientology of Cal.*, 520 F.2d 818 (9th Cir. 1975)..... 7

*United States v. Custodian of Records, Sw. Fertility Ctr.*, 743 F. Supp 783 (W.D.Okla. 1990) ..... 10

1 STATUTES

2 Securities Act of 1933, § 19 [15 U.S.C. § 77s]..... 2, 3, 9  
3 Securities Act § 20 [15 U.S.C. § 77t]..... 3, 7  
4 Securities Act § 22(b) [15 U.S.C. § 77v(b)] ..... 7  
5 Securities Exchange Act of 1934 § 21 [15 U.S.C. § 78u]..... 2, 3, 7  
6 Exchange Act § 23(a) [15 U.S.C. § 78w(a)] ..... 9

7  
8 RULES

9 FED. R. CIV. P. 81(a)(5)..... 10  
10 17 C.F.R. § 201.232(c)..... 5, 6, 9  
11 17 C.F.R. § 201.150 ..... 5,6, 9  
12 17 C.F.R. § 203.1 ..... 8  
13 17 C.F.R. § 203.4(b) ..... 2, 3, 9  
14 17 C.F.R. § 203.8 ..... 5, 6, 9  
15 17 C.F.R. §201.230(g) ..... 11

16  
17 OTHER AUTHORITIES

18 FED. R. CIV. P. 45 advisory committee’s note..... 9  
19 FED. R. CIV. P. 81 advisory committee’s note..... 10  
20 SEC Enforcement Manual § 2.4..... 12  
21 SEC Enforcement Manual § 3.1.3..... 11

22  
23  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 The Securities and Exchange Commission (the “Commission”) applies to the Court for an  
4 order enforcing an administrative subpoena issued by the Commission during its investigation into the  
5 activities of Phillip Cory Roberts and his company, BayPeak LLC (“BayPeak”), in connection with  
6 reverse merger and financing transactions involving shell companies and China-based operating  
7 companies. Specifically, the Commission is investigating Respondent’s and BayPeak’s involvement  
8 in facilitating reverse merger financing for at least nine China-based entities through private offerings  
9 of securities, the issuance and exercise of warrants to purchase securities, initial public offerings of  
10 securities, and direct financing. Neither Respondent nor BayPeak is registered with the Commission  
11 as would be required by law if they were engaging in the business of effecting transactions in  
12 securities for their account or the accounts of others.

13 This application follows Respondent’s failure to appear for testimony in response to an  
14 administrative subpoena the Commission issued to him on September 30, 2014.<sup>1</sup> Consistent with the  
15 rules governing the Commission’s service of administrative subpoenas, Commission staff has used  
16 every practicable method to provide notice and serve Respondent with the subpoena requiring his  
17 appearance for testimony at the Commission’s San Francisco Regional Office on October 17, 2014.  
18 The Commission served Respondent by United States mail, UPS overnight delivery, and by having a  
19 process server leave a copy of the subpoena with Respondent’s wife at their shared residence. The  
20 Commission also provided Respondent’s counsel with a copy of its subpoena. Despite receiving  
21 actual notice and being properly served pursuant to the rules governing service of the Commission’s  
22 administrative subpoenas, Respondent failed to appear for testimony as required on October 17, 2014.

23 Accordingly, the Commission requests that the Court issue an order compelling Phillip Cory  
24 Roberts to appear for testimony at an agreed-upon date and time within fourteen days after entry of a  
25 Court order granting the Commission’s application.

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26 <sup>1</sup> The Commission also issued a subpoena to Respondent on September 29, 2014, but this subpoena  
27 was never successfully served, and the Commission is not seeking to enforce it.

1 **II. STATEMENT OF FACTS**

2 **A. The Commission's Investigation**

3 The Commission is investigating whether Respondent and his wholly-owned entity, BayPeak,  
4 unlawfully acted as unregistered broker-dealers in connection with a series of reverse merger and  
5 financing transactions involving China-based operating companies. Declaration of Thomas W. Peirce  
6 ("Peirce Decl.") at ¶ 5. It is also investigating possible fraud in connection with the disclosure of  
7 beneficial ownership interests and trading in the securities of the companies resulting from the reverse  
8 mergers. *Id.* A reverse merger is a transaction by which a privately-held, operating company with no  
9 publicly-traded stock merges with a publicly-listed shell company that has no assets or revenue but has  
10 stock available for public trading, resulting in the operating company becoming a public company.

11 On August 16, 2010, pursuant to Sections 19(c) and 20(a) of the Securities Act of 1933 (the  
12 "Securities Act") [15 U.S.C. §§ 78u(a)-(b), 77s(c), and 77t(a)] and Sections 21(a) and 21(b) of the  
13 Exchange Act of 1934 (the "Exchange Act") and Rule 203.4(b) of the Commission's Rules Relating  
14 to Investigations [17 C.F.R. § 203.4(b)], the Commission issued an Order Directing Private  
15 Investigation and Designating Officers to Take Testimony in an investigation captioned *In the Matter*  
16 *of Fuqi International, Inc.* (the "Fuqi Formal Order"). Peirce Decl. at ¶ 3. The Fuqi Formal Order  
17 directed the Commission staff to investigate whether violations of the antifraud and other provisions  
18 of the federal securities law have occurred. *Id.* The Fuqi Formal Order granted certain designated  
19 Commission staff the authority to issue administrative subpoenas for testimony and for the  
20 production of documents. *Id.* Pursuant to that order, the Commission issued an administrative  
21 subpoena requiring Respondent to appear for testimony on November 19, 2013, which he did. Peirce  
22 Decl. at ¶ 4.

23 Following Respondent's November 2013 testimony, the Commission staff gathered additional  
24 evidence and decided to open an investigation captioned *In the Matter of BayPeak, LLC* (HO-12431),  
25 focusing on possible illegal unregistered broker-dealer activity in connection with the involvement of  
26 Respondent and BayPeak in reverse merger and financing transactions for at least nine China-based  
27 entities, including Fuqi, through private offerings of securities, the issuance and exercise of warrants to  
28

1 purchase securities, initial public offerings of securities, and direct financing. Peirce Decl. at ¶ 5. On  
2 July 21, 2014, Commission staff, in a telephone call and letter bearing the heading, “Re: In the Matter  
3 of BayPeak, LLC (HO-12431),” notified Respondent and BayPeak through their counsel, James  
4 Masella, that Commission staff had made a preliminary determination to recommend that the  
5 Commission bring an action or proceeding against Respondent and BayPeak alleging violations of the  
6 federal securities laws. Peirce Decl. at ¶ 6-7, Exh. 1. This notification process is referred to as a  
7 “Wells Notice.” On August 11, 2014, Mr. Masella responded to this notification in a letter bearing the  
8 heading, “Re: In the Matter of BayPeak, LLC (HO-12431),” and stating, “As you know, we represent  
9 Cory Roberts and BayPeak LLC in the above matter.” Peirce Decl. at ¶ 8.

10 In the August 11, 2014 letter, Roberts and BayPeak raised defenses and took positions that  
11 seemed to the Commission staff to be inconsistent with the documentary evidence produced by  
12 Respondent and BayPeak following Respondent’s November 2013 testimony. Peirce Decl. at ¶ 9. In  
13 the interim, the staff also developed evidence of other possible violations of the federal securities laws.  
14 *Id.* Consistent with the purpose of the Wells process, these developments led the staff to seek  
15 additional investigative testimony from Respondent to determine the appropriate recommendation to  
16 the Commission. *Id.*

17 On September 19, 2014, the Commission staff contacted counsel for Respondent, Mr. Masella,  
18 to inform him that it intended to seek additional investigative testimony from Respondent and  
19 suggested two weeks in October during which the Commission staff could be available to take  
20 Respondent’s testimony at his convenience. Peirce Decl. at ¶ 10. During this call, Mr. Masella asked  
21 if Commission staff would be willing to travel to San Francisco for the testimony and said that he  
22 would discuss dates for the testimony with his client and contact the Commission staff shortly. *Id.*

23 In order to subpoena on-the-record testimony, on September 23, 2014, pursuant to Sections  
24 19(c) and 20(a) of the Securities Act [15 U.S.C. §§ 78u(a)-(b), 77s(c), and 77t(a)] and Sections 21(a)  
25 and 21(b) of the Exchange Act and Rule 203.4(b) of the Commission’s Rules Relating to  
26 Investigations [17 C.F.R. § 203.4(b)], staff sought and the Commission issued an Order Directing  
27 Private Investigation and Designating Officers to Take Testimony in the investigation designated as *In*



1 | *the Matter of BayPeak, LLC*, SEC File No. HO-12431 (the “BayPeak Formal Order”). Peirce Decl. at  
2 | ¶ 11.

3 |         Having not heard back from Mr. Masella as to possible dates for Respondent’s testimony, the  
4 | staff contacted Mr. Masella by email on September 24, 2014. Peirce Decl. at ¶ 12, Exh. 2. In that  
5 | email, the staff agreed to conduct Respondent’s testimony at the Commission’s San Francisco  
6 | Regional Office, proposed three possible dates for the testimony, and asked him to choose the one that  
7 | was most convenient. *Id.* Mr. Masella did not respond with a proposed date for testimony. Peirce  
8 | Decl. at ¶ 12. On September 25, 2014, as it had with its previous administrative subpoenas to  
9 | Respondent, Commission staff sent a subpoena for testimony to Respondent care of his counsel, Mr.  
10 | Masella. This subpoena sought Respondent’s appearance for testimony on October 17, 2014, at the  
11 | Commission’s San Francisco Regional Office. Peirce Decl. at ¶ 13.

12 |         On the following day, September 26, 2014, Mr. Masella and Commission staff spoke by  
13 | telephone. Peirce Decl. at ¶ 14. During this call, Mr. Masella stated that he had not been retained to  
14 | represent Respondent in the investigation entitled, *In the Matter of BayPeak, LLC* (despite accepting  
15 | the Wells call and Notice in the matter and submitting a letter to Commission staff on August 11, 2014  
16 | stating the opposite) and that he was not authorized to accept service of the Commission’s  
17 | administrative subpoena on behalf of Respondent. *Id.* On September 27, 2014, however, Mr. Masella  
18 | sent an email to Commission staff in which he “object[ed] to any verbal communications between  
19 | members of the Commission, on the one hand, and Respondent or employees of Bay Peak, on the  
20 | other.” Peirce Decl. at ¶ 15, Exh. 3.

#### 21 |         **B. Service of the At-Issue Subpoena**

22 |         On September 29, 2014, process servers hired by the Commission staff attempted twice to  
23 | personally serve Respondent with an administrative subpoena for testimony at his home in Mill  
24 | Valley, California. Peirce Decl. at ¶ 16. According to the process servers, during the first attempt,  
25 | Respondent’s wife, Lily Roberts, answered the door and told process servers that Respondent was not  
26 | home, but would return later that day. The process servers attempted again that day to personally  
27 | serve Respondent at his residence. Process servers informed Commission staff that after ringing the  
28 |

1 doorbell, they heard a child call for the child's father to answer the door. According to the process  
2 servers, Lily Roberts then answered the door, insisted that Respondent was not in the residence, and  
3 this time said he was traveling.

4           On the following day, September 30, 2014, in accordance with 17 C.F.R. §§203.8,  
5 201.232(c)(directing that investigative subpoenas be served in accordance with 17 C.F.R. § 201.150(b)  
6 through (d)) , and 201.150(c) and (d) (authorizing service by U.S. mail, express delivery service, or by  
7 leaving the document with a person of suitable age and discretion at the person's residence) (attached  
8 hereto as Exhibit 4), the Commission staff served Respondent with an administrative subpoena for  
9 testimony by sending copies to his residence in Mill Valley by United States mail, by UPS overnight  
10 delivery, and by having a process server leave a copy of the subpoena with Lily Roberts as she exited  
11 the Mill Valley residence she shares with Respondent. Peirce Decl. at ¶ 17, Exh. 5. Commission staff  
12 received written confirmation that copies of the subpoena were delivered via UPS overnight delivery  
13 and by the process server. Peirce Decl. at ¶ 17, Exhs. 6 and 7.

14           On October 9, 2014, because Mr. Masella had objected to Commission staff  
15 communicating with Respondent directly, Commission staff emailed Mr. Masella to confirm that  
16 Respondent would appear for testimony on October 17, 2014, as required by the Commission's  
17 administrative subpoena. Peirce Decl. at ¶ 18, Exh. 8. Mr. Masella responded that he understood that  
18 Respondent had not yet been properly served. *Id.* In response, Commission staff informed Mr.  
19 Masella that Respondent had, in fact, been properly served with an administrative subpoena, consistent  
20 with the procedures set forth for service of SEC investigative subpoenas in its Rules of Practice. *Id.*  
21 The Commission staff subsequently provided Mr. Masella with copies of the UPS delivery  
22 confirmation and the affidavit of service from the process server. Peirce Decl. at ¶ 18.

23           On October 14, 2014, the Commission staff received a letter from Mr. Masella stating that  
24 he did not believe that Respondent had been properly served with the Commission's administrative  
25 subpoena because it was not served personally on Respondent. Peirce Decl. at ¶ 19, Exh. 9. In this  
26 letter, Mr. Masella argued that Federal Rule of Civil Procedure 45 governed the Commission's service  
27 of its administrative subpoena, not the Commission's own Rules of Practice set forth in 17 C.F.R.

1 §§203.8, 201.232(c), and 201.150(c) and (d). *Id.* The Commission staff responded on October 15,  
2 2014, with a letter to Mr. Masella outlining the Congressional authority for the Commission's  
3 enactment of the Rules of Investigation and Practice that govern service of Commission administrative  
4 subpoenas and referring Mr. Masella to several cases that make clear "that the rules of civil procedure  
5 do not apply to restrict or control administrative subpoenas." Peirce Decl. at ¶ 20, Exh. 10. On  
6 October 16, 2014, Mr. Masella again wrote to the Commission staff, maintaining his position that the  
7 Commission was without authority to enact its own administrative regulations governing service of its  
8 administrative subpoenas and stating that Respondent would not appear for testimony the following  
9 day. Peirce Decl. at ¶ 21, Exh. 11.

10 **C. Roberts's Failure to Comply with the Properly-Issued Subpoena and the**  
11 **Commission's Attempt to Meet and Confer.**

12 Respondent did not appear for testimony on October 17, 2014, as required by the  
13 Commission's administrative subpoena. Peirce Decl. at ¶ 22. On that same day, Commission staff  
14 requested a call with Mr. Masella to meet and confer in an effort to resolve the disagreement about  
15 whether Respondent had been properly served with a subpoena requiring him to appear for  
16 investigative testimony and to agree upon a date for that testimony. Peirce Decl. at ¶ 23. During that  
17 call, held on October 20, 2014, Mr. Masella stated that he intended to maintain the position that the  
18 Commission's compliance with its own Rules of Practice with respect to service of its administrative  
19 subpoenas was insufficient and that he would not discuss dates for Respondent's investigative  
20 testimony until Respondent was personally served with a subpoena. *Id.* Mr. Masella also stated that,  
21 despite his extensive correspondence and discussions with Commission staff regarding the matter, he  
22 had not been retained to represent Respondent in the BayPeak investigation. *Id.*

23 Because Mr. Masella has objected to communications by Commission staff with Respondent,  
24 even while periodically claiming not to represent Respondent in this matter, Commission staff has no  
25 ability to resolve this matter directly with Respondent. Thus, the Commission staff is unable to reach  
26 a resolution regarding Respondent's noncompliance with the Commission's administrative subpoena.

1 **III. ARGUMENT**

2 **A. This Court Has the Authority to Enforce the Commission’s Validly Issued Subpoena**  
3 **in a Summary Proceeding.**

4 Congress has given the Commission “broad authority to conduct investigations into possible  
5 violations of the federal securities laws and to demand production of evidence relevant to such  
6 investigations.” *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 741 (1984). This includes the power to  
7 “subpoena witnesses, compel their attendance, take evidence, and require the production of any  
8 books, papers, correspondence, memoranda, or other records which the Commission deems relevant  
9 or material to the inquiry.” 15 U.S.C. § 78u(b); *see also* 15 U.S.C. § 77t(a).

10 If a party refuses to comply with a Commission subpoena, the Commission may seek a court  
11 order compelling full compliance. *See* 15 U.S.C. § 77v(b); 15 U.S.C. § 78u(c). Jurisdiction over  
12 subpoena enforcement actions is explicitly conferred on the United States district courts. 15 U.S.C. §  
13 78u(c). Venue for such actions is proper where the subpoenaed person resides or does business. *Id.*  
14 In this case, venue in the Northern District of California is proper because the subpoenaed person,  
15 Phillip Cory Roberts, resides in the Northern District in Mill Valley, California. Peirce Decl. at ¶ 2.

16 Moreover, a subpoena enforcement application may be granted in summary show cause  
17 proceedings. *See EEOC v. St. Regis Paper Co.-Kraft Div.*, 717 F.2d 1302, 1304 (9th Cir. 1983)  
18 (stating that “[a] subpoena enforcement action is a summary procedure” with no discovery absent  
19 “exceptional circumstances”); *see also United States v. Church of Scientology of Cal.*, 520 F.2d 818,  
20 821 (9th Cir. 1975) (stating that “a district court may limit the[ ] application [of the Federal Rules of  
21 Civil Procedure] in a proceeding to enforce a summons which is intended to be a summary  
22 proceeding”). This summary procedure, rather than an action instituted by complaint, is appropriate  
23 because investigative agencies in general, and the Commission in particular, should be “free . . . [of]  
24 undue interference or delay to conduct an investigation which will adequately develop a factual basis  
25 for a determination as to whether particular activities come within the Commission’s regulatory  
26 authority.” *SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973). This  
27 Court may therefore rule upon the Commission’s application in summary show cause proceedings.

1           **B. The Commission’s Subpoena to Respondent Satisfies the Standards for Judicial**  
2           **Enforcement.**

3           “The scope of the judicial inquiry in an . . . agency subpoena enforcement proceeding is quite  
4 narrow.” *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) (quoting *EEOC*  
5 *v. Children’s Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (*en banc*)). Courts in  
6 the Ninth Circuit consider: (1) whether Congress has granted the authority to investigate; (2) whether  
7 procedural requirements have been followed; and (3) whether the evidence is relevant and material to  
8 the investigation. *Id.* However, the showing required to meet the third prong of this test is minimal.  
9 Thus, a court “must enforce administrative subpoenas unless the evidence sought by the subpoena [is]  
10 plainly incompetent or irrelevant to any lawful purpose of the agency.” *Id.* (internal quotations  
11 omitted). *See also EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 446 (9th Cir. 1998). Because  
12 the Commission meets these criteria in this case, the Court should enforce the subpoena.

13           **1. The Commission Is Authorized to Conduct this Investigation.**

14           First, the Commission has the authority to conduct the investigation authorized by the Formal  
15 Order. As noted above, Congress has granted the Commission broad authority to investigate  
16 potential violations of the federal securities laws and to demand evidence germane to such  
17 investigations. In light of this statutory grant, courts have consistently recognized the Commission’s  
18 broad authority to issue investigative subpoenas. *Jerry T. O’Brien*, 467 U.S. at 743 (“The provisions  
19 vesting the SEC with power to issue and seek enforcement of subpoenas are expansive”); *SEC v.*  
20 *Dresser Indus.*, 628 F.2d 1368, 1379-80 (D.C. Cir. 1980) (*en banc*) (“Given this broad statutory  
21 mandate, there is virtually no possibility that in issuing this subpoena, the SEC was acting ultra  
22 vires”).

23           **2. The Commission Followed All Procedural Requirements for Issuance and**  
24           **Service of the Administrative Subpoena to Respondent.**

25           The Commission followed all appropriate procedural requirements in issuing the subpoena.  
26 In accordance with its Rules Relating to Investigations [17 C.F.R. § 203.1 *et seq.*], the Commission  
27 issued the BayPeak Formal Order, which sets forth the purpose of the investigation and authorizes  
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1 designated members of its staff to conduct the investigation, including by issuing subpoenas for  
2 testimony. *See* 17 C.F.R. § 203.4(b). The subpoena was issued by a staff member designated in the  
3 Formal Order. Peirce Decl. at ¶ 11.

4           Despite counsel for Respondent’s claims to the contrary, the Commission also followed the  
5 relevant procedural requirements for service of its administrative subpoena. Consistent with 17 C.F.R.  
6 §§203.8, 201.232(c), and 201.150(c) and (d), Commission staff served Respondent with the  
7 administrative subpoena for testimony by sending copies to his residence in Mill Valley by United  
8 States mail, by UPS overnight delivery, and by having a process server leave a copy of the subpoena  
9 with Lily Roberts, a person of suitable age and discretion, as she exited the residence she and  
10 Respondent share. Peirce Decl. at ¶ 17, Exhs. 6, 7. Although he has not disputed that he received  
11 actual notice of the Commission’s issuance of the administrative subpoena, Respondent, through  
12 counsel James Masella, refused to appear on the specified date for his testimony because he claimed  
13 that the Commission’s compliance with the administrative regulations enacted specifically to govern  
14 the service of the Commission’s administrative subpoenas was inadequate. *See* Exhs. 9, 11.  
15 Respondent argued that the Commission was required to serve him personally pursuant Federal Rule  
16 of Civil Procedure 45. *Id.* This is incorrect and part of a continued effort to avoid appearing for  
17 testimony as required by the Commission’s lawfully-issued, administrative subpoena.

18           As an initial matter, the Commission’s Rules Relating to Investigations and Rules of  
19 Practice were validly enacted pursuant to the authority granted to it by Congress under § 19(c) of the  
20 Securities Act [15 U.S.C. § 77s(c)] and § 23(a) of the Exchange Act [15 U.S.C. § 78w(a)]. Moreover,  
21 it is well-settled that the Federal Rules of Civil Procedure do not govern administrative subpoenas.  
22 *See* FED. R. CIV. P. 45 advisory committee’s note (Rule 45 “does not apply to enforcement of  
23 subpoenas issued by administrative officers pursuant to statutory authority”); *Bowles v. Bay of New*  
24 *York Coal & Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945) (“It appears to be agreed by both parties  
25 that the rules of civil procedure do not apply to restrict or control administrative subpoenas. This is  
26 quite settled.”); *CFTC v. Ekasala*, \_\_\_ F. Supp.2d \_\_\_, 2014 WL 3756130, at \*2 n.1 (Jul. 31, 2014  
27 D.D.C.); *SEC v. F.N. Wolf & Co., Inc.*, No. 93-0379, 1993 WL 568717, at \*1 (S.D.N.Y. Dec. 14,

1 1993); *United States v. Custodian of Records, Sw. Fertility Ctr.*, 743 F. Supp 783, 787 (W.D. Okla.  
2 1990) (holding that FED. R. CIV. P. 45’s personal service requirement did not apply to an  
3 administrative subpoena).

4 In response, Respondent’s counsel has cited to Federal Rule of Civil Procedure  
5 81(a)(5), which states, “These rules apply to *proceedings to compel* testimony or the production of  
6 documents through a subpoena issued by a United States officer or agency under a federal statute,  
7 except as otherwise provided by statute, by local rule, or by court order in the proceedings” (italics  
8 added). This provision does not apply to the issue in dispute here—service of an administrative  
9 subpoena requiring the recipient to appear for testimony or produce documents. Instead Rule  
10 81(a)(5) refers to proceedings in federal district courts to enforce administrative subpoenas. This is  
11 made plain by the Notes of the Advisory Committee for the 1946 amendment, which state:

12 The added sentence makes it clear that the rules apply to appeals from  
13 *proceedings to enforce* administrative subpoenas. And, although the provision  
14 allows full recognition of the fact that the rigid application of the rules in the  
15 proceedings themselves may conflict with the summary determination desired, it  
is drawn so as to permit application of any of the rules in the proceedings  
whenever the district court deems them helpful.

16 FED. R. CIV. P. 81 advisory committee’s note (italics added) (internal citations omitted).

17 Respondent was served with the Commission’s administrative subpoena consistent with  
18 validly-enacted Commission Rules Relating to Investigations and Rules of Practice. As a result, his  
19 failure to appear is unexcused, and this Court should compel his compliance.

20 **3. The Subpoena to Respondent Was Issued for the Proper Purpose of**  
21 **Obtaining Relevant and Material Evidence.**

22 The testimony sought by the Commission’s administrative subpoena to Respondent is  
23 relevant and material to the Commission’s investigation. As noted above, the Commission’s  
24 investigation concerns Respondent’s and BayPeak’s involvement in facilitating reverse merger  
25 financing for at least nine China-based entities through private offerings of securities, the issuance  
26 and exercise of warrants to purchase securities, initial public offerings of securities, and direct  
27 financing. Peirce Decl. at ¶ 4. It seems self-evident that the testimony of Respondent that is sought  
28

1 by the subpoena is relevant and material to the Commission's investigation, and Respondent has not  
2 contended otherwise. Instead, Respondent is attempting to use the Commission staff's notification  
3 that the staff made a preliminary determination to recommend that the Commission file an  
4 enforcement action against Respondent and BayPeak as an excuse to avoid complying with the  
5 subpoena for his testimony. There is no basis for Respondent's refusal to comply with the subpoena  
6 because a Wells notice, such as the staff provided, does not terminate the Commission's investigative  
7 power. *See SEC v. Stilwell*, No. 14-2572014 WL 4631915, at \*2 (S.D.N.Y. Sept. 11, 2014); *SEC v.*  
8 *Sears*, No. 05-728, 2005 WL 5885548, at \*2 (D. Or. July 28, 2005).

9 Respondent's counsel has asserted in correspondence to Commission staff that Respondent is  
10 "justified in not cooperating with" the Commission's administrative subpoena for his testimony  
11 because he claims the subpoena does not serve a proper investigatory purpose, but rather is being  
12 used to circumvent the civil discovery process. *See* Exh. 11. In support of his argument,  
13 Respondent's counsel cited a Commission Rule of Practice and a provision of the Commission's  
14 internal Enforcement Manual, both of which make clear that they apply to the issuance of  
15 investigative subpoenas *after* the Commission has instituted an administrative proceeding or filed a  
16 federal court action, and thus have no application here. *See* 17 C.F.R. §201.230(g) ("The hearing  
17 officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory  
18 subpoenas *after the institution of proceedings* is not for the purpose of obtaining evidence relevant to  
19 the proceedings . . .") (italics added); SEC Enforcement Manual § 3.1.3 ("The Division may continue  
20 to investigate and issue investigative subpoenas pursuant to a formal order of investigation while  
21 *simultaneously litigating a related civil action* if there is an independent, good-faith basis for the  
22 continued investigation.") (italics added). There is no merit to Respondent's argument because the  
23 Commission staff's investigation is still ongoing, and no enforcement proceeding has been instituted  
24 or even recommended to the Commission.

25 Moreover, the fact that the Commission staff provided Respondent with a Wells notice informing  
26 him that the staff had made a preliminary determination to recommend to the Commission that it institute  
27 an enforcement action against him and seeking a submission from Respondent setting forth any facts or  
28



1 legal arguments that the staff should consider in making a final recommendation has no impact on the  
2 Commission staff's ability to continue its investigation. *See SEC v. Sears*, 2005 WL 5885548, at \*2.  
3 Only the Commission has the authority to determine whether to institute an action and what charges  
4 to bring. It has not done so here. Rather, it was the Commission staff, which has the ability only to  
5 recommend charges to the Commission, who gave Respondent a Wells Notice. Peirce Decl. at ¶¶ 6-  
6 7. But even as to that preliminary determination, the staff has not yet recommended any action to the  
7 Commission. Thus, the Commission's investigation properly continues.

8 In addition, the Commission's institution of an action is not a foregone conclusion. As the  
9 staff notified Respondent, he may submit a Wells Submission, which is a document or videotaped  
10 presentation explaining why the Commission (not the staff) should not institute charges. *See* Exh. 1.  
11 The objective of allowing a Wells Notice recipient such direct access to the Commission:

12 is, as the Commission stated in the original Wells Release, for the Commission  
13 "not only to be informed of the findings made by its staff but also, where  
14 practicable and appropriate, *to have before it the position of persons under  
investigation at the time it is asked to consider enforcement action.*"

15 Enforcement Manual, § 2.4 (quoting Securities Act of 1933 Rel. No. 5310, Sept. 27, 1972) (italics  
16 added)). In the case of Respondent, no recommendation has yet been made to the Commission and  
17 the Commission may, in any event, choose not to authorize the institution of an action.

18 In *SEC v. Stilwell*, just as in the instant case, Commission staff sought additional investigative  
19 testimony from a witness after notifying him that the staff intended to recommend that the  
20 Commission bring an enforcement action against him. 2014 WL 4631915, at \*1. Like Respondent  
21 has here, Stilwell argued that the Commission's subpoena was issued for "the improper purpose of  
22 allowing the SEC to obtain discovery in advance of what he perceive[d] to be inevitable litigation, in  
23 contravention of the spirit of the administrative rules." *Id.* at \*2. The district court rejected this  
24 argument, holding, "the Commission's investigatory prerogative permits its staff to reach tentative  
25 conclusions and thereafter seek additional documents or testimony in aid of making final  
26 determinations." *Id.* (citing *SEC v. Sears*, 2005 WL 5885548, at \*2).

1 Similarly, in *SEC v. Sears*, the district court found “no regulation that precludes the  
2 [Commission] from continuing with or reopening its investigation following the issuance of a Wells  
3 notice.” 2005 WL 5885548, at \*4. Indeed, as the court noted:

4 The *Sears* point to no regulation that precludes the SEC from continuing with or  
5 reopening its investigation following issuance of a Wells notice. On the contrary,  
6 the information submitted in response to a Wells notice may prompt further  
7 inquiry by the agency staff before making a final recommendation. A Wells  
8 notice is more appropriately viewed as a preliminary recommendation that is  
9 being circulated for comment. Even when no Wells submission is made in  
response to the Wells notice, the agency may thereafter learn of additional facts  
that warrant investigation, or seek additional documents or testimony to confirm  
its preliminary understanding of the facts or to clarify any lingering confusion.

10 *Id.* at \*2.

11 Respondent’s argument against enforcement of the Commission’s administrative subpoena  
12 must fail also because the scope of the Commission’s investigation involves not just Respondent’s  
13 own potential violations of the securities laws, but the roles played by other persons involved in the  
14 transactions at issue. The testimony sought through the Commission’s administrative subpoena is  
15 also relevant to the Commission’s assessment of the potential liability of other individuals and  
16 entities. In order for the Commission to carry out its enforcement responsibilities effectively, it must  
17 have timely access to all the information the Commission deems relevant and material to its inquiry.  
18 For these reasons, the Court should enforce the administrative subpoena against Respondent.

19 **IV. CONCLUSION**

20 For the foregoing reasons, the Commission requests that the Court enter an order compelling  
21 Phillip Cory Roberts to comply with the Commission’s administrative subpoena. A proposed order  
22 granting such relief is filed concurrently with this Application.

23  
24 DATED: November 7, 2014

Respectfully Submitted,

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26 \_\_\_\_\_  
Attorney for Plaintiff  
27 SECURITIES AND EXCHANGE  
COMMISSION